U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

H4

MAY 20 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER, CA Date:

IN RE: Applicant: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who on March 17, 1992, was convicted of the offense of Aiding and Abetting Illegal Entry in violation of 18 U.S.C. § 2 and 8 U.SC. § 1325. On July 20, 1993, he was removed from the United States pursuant to section 212(a)(6)(E)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(E)(i), for knowingly encouraging, assisting, abetting, aiding any other alien to enter or to try to enter the United States in violation of law. The record reflects that the applicant reentered the United States after his removal on an unknown date without a lawful admission or parole and without permission to reapply for admission in violation of § 276 of Act, 8 U.S.C. § 1326. The applicant married a naturalized U.S. citizen on December 19, 1994, and is the beneficiary of an approved Petition for Alien Relative. He is inadmissible under section 212(a)(9)(A)(ii) the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) and he now seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii) in order to remain in the United States and reside with his spouse and children.

The Director determined that the applicant is not eligible for any exception or waiver under section 212(a)(6)(E)(i) of the Act and denied the Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Director's Decision* dated October 28, 2003.

On appeal, counsel states that the applicant is eligible for permission to reapply because the favorable factors in this matter outweigh the unfavorable ones. Counsel further states that the applicant is eligible for relief pursuant to an application for waiver of grounds of excludability and that his U.S. citizen spouse and four children will suffer extreme hardship. A review of the record of proceedings does not reveal that an application for waiver of grounds of excludability has been filed on behalf of the applicant.

The record reflects that on March 17, 1992 in the U.S. District Court, Southern District of California the applicant was convicted of the Offense of Aiding and Abetting Illegal Entry under 8 U.S.C. § 1325 & 18 U.S.C. § 2. The applicant was aiding and abetting an individual not related to him to illegally enter the United States.

In his decision the Director determined that the applicant's inadmissibility is an aggravated felony for immigration purposes.

Section 101(a)(43) of the Act defines the term "aggravated felony":

> (N) an offense described in paragraph (1)(A) or (2) of section 274(a) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act.

The AAO finds that the Director erred in finding that the applicant's inadmissibility is an aggravated felony for immigration purposes since section 274(a) of the Act refers to 8 U.S.C. § 1324 (Bringing in and Harboring Certain Aliens) and the applicant was not convicted under 8 U.S.C. § 1324 but rather under 8 U.S.C. § 1325,

a misdemeanor. Nevertheless, this office finds the director's error to be harmless. The applicant is clearly inadmissible under section 212(a)(6)(E) of the Act.

Section 212(a)(6)(E) of the Act provides, in pertinent part, that:

> (i) In general.-Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.
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> (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (d)(11).

Section 212(d)(11) of the Act provides that:

> The Attorney General (now the Secretary of Homeland Security, [Secretary]) may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

Section 212(a)(6)(E)(i) of the Act describes the basic smuggling activities that will suffice, even in the absence of a criminal conviction, to exclude or deport an alien from the United States. The record of proceeding clearly reflects that the applicant knowingly encouraged and assisted an individual to enter or try to enter the United States in violation of law and therefore the applicant is inadmissible under section 212(a)(6)(E)(i) of the Act. Although 8 U.S.C. § 1325 does not contain the element of the offense of alien smuggling, the applicant was convicted in violation of both 8 U.S.C. § 1325 and 18 U.S.C. § 2.

18 U.S.C. § 2 states:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The applicant's conviction in violation of 18 U.S.C. § 2 and 8 U.S.C. § 1325 shows that he was involved in alien smuggling by aiding and encouraging an individual to enter the United States in violation of law.

As stated above, section 212(d)(11) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(6)(E)(i) of the Act is available to an applicant if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law. In the instant case the applicant was not found assisting a qualifying family member and therefore no waiver is available to him.

Matter of Martinez-Torres, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

No purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. The applicant is not eligible for any relief under the Act and the appeal will be dismissed.

ORDER: The appeal is dismissed.